

By *Melissa Fitchner*

NO. 18DCR0152

STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
vs.	§	344 <sup>TH</sup> JUDICIAL DISTRICT OF
	§	
ZENA STEPHENS	§	CHAMBERS COUNTY, TEXAS
	§	

**MEMORANDUM IN SUPPORT OF**  
**DISCOVERY OF GRAND JURY TESTIMONY**

**TO THE HONORABLE JUDGE OF SAID COURT:**

Now comes Zena Stephens, hereinafter Defendant, by and through counsel, and respectfully submits this Memorandum in support of his Motion for discovery of Grand Jury Testimony. For the reasons discussed below, disclosure is appropriate because the defendant has established that a particularized need exist.

**I. OVERVIEW**

The indictment has been returned charging the Defendant with tampering with a government document, abuse of official capacity and accepting cash contributions in excess of \$100. . Defense counsel has reason to believe that several witnesses, specifically Witness, gave testimony before the grand jury regarding the allegations against defendant. There is a high probability that the witnesses that provided grand jury testimony will be called during the trial and become the State's key witnesses. The disclosure of the grand jury transcripts before trial is mandated by Defendant's federal and state constitutional rights to a fair trial, a presumption of innocence, confrontation, and effective assistance of counsel.

## II. ARGUMENT

The general rule is the proceedings of the grand jury shall be kept secret. Tex. Code Crim. Proc. Art. 20.02. A defendant has a right to petition to a court to order the disclosure of information otherwise made secret by this article...on the disclosure of a recording of typewritten transcription as a matter preliminary to or in connection with a judicial proceeding. *Id.* The court may order disclosure of testimony upon a showing by the defendant of a “particularized need.” *Id.*

A particularized need is dependent on the totality of the circumstances. *Bynum v. State*, 767 S.W.2d 769, 783 (Tex. Crim. App. 1989). It is the defendants’ burden to show a particularized need exists that outweighs the policy of secrecy. Courts have previously held that “after the grand jury’s functions have ended, disclosure is wholly proper where the ends of justice require it.” *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940). Additionally, Courts have concluded, “that cases of particularized need for the use of grand jury transcript at trial are to impeach a witness, to refresh his recollection, and to test his credibility.” *Dennis v. United States*, 384 U.S. 855, 870 (1966) (quoting *Proctor & Gamble*, 356 U.S. 677, 681 (1958)). In such cases, the secrecy of the proceedings is “lifted discretely and limitedly.” *Id.* At the discretion of the trial court, once the defendant has established a particularized need, defense counsel might have access to relevant portions of the grand jury testimony of a trial witness. *Dennis*, 384 U.S. at 870 (citing *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959)). In determining whether to lift the veil of secrecy, courts should lean towards “disclosure rather than suppression which ordinarily promotes the proper administration of justice.” *Dennis*, 384 U.S. at 870.

In *Dennis*, the defendant requested the transcript of grand jury testimony of witnesses for possible impeachment at trial. *Id.* at 868. The United States Supreme Court found that the District Court abused its discretion when they refused to disclose to the defendant the grand jury testimony

of the four government witnesses. *Id.* at 875.

The Court held that the Defendant demonstrated a particularized need and made a showing “substantially beyond the minimum required.” *Id.* at 872. The Court reasoned that it is “rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact.” *Id.* at 873. The Court further reasoned that they could not accept the view of the lower courts who argued it “safe to assume no inconsistencies would have come to light if the grand jury testimony was examined.” *Id.* at 874. There was “no justification for relying upon such assumption.” *Id.* The Court further recognized that in cases such as this, “where the question of innocence or guilt may turn on exactly what was said, the defense is entitled to all relevant aid which is reasonably available to ascertain the precise substance of the statements.” *Id.* at 872-73.

**a. A PARTICULARIZED NEED EXIST FOR A TRANSCRIPT OF THE GRAND JURY PROCEEDINGS IN ORDER TO AVOID INJUSTICE AND AN UNNECESSARY DELAY IN TRIAL**

In this case, the proper administration of justice is to provide a copy of the grand jury transcript to defense counsel before trial. Because of the nature of this case and the allegations brought against the defendant, discovery is voluminous. If delivery is delayed until trial, counsel will be forced to ask for a recess after each of the state's witnesses to request production and inspection of that witness grand jury testimony under Texas Rules of Evidence 615(d). The recess is to allow defense counsel to conduct a reasonable examination for adequately confronting each witness. Although, the production and inspection of grand jury testimony is ideal during trial for secrecy concerns; defense counsel asserts that delaying preparation will (1) slow down the trial, (2) unfairly prejudice the defendant, and (3) give rise to ineffective assistance of counsel.

Defendant has the right to an impartial review of his case. The testimony before the grand jury may be inconsistent with other statements the witnesses have made. If so, defense counsel needs to know before trial in order to efficiently prepare to cross-examine the State's witnesses. Furthermore, there is a reason to believe that the testimony provided before grand jury contains exculpatory material discoverable under *Brady v. Maryland*, 373 U.S. 83 (1963). This material cannot be readily available for defense counsel by any other means, and without the transcript, Defendant would be prejudiced.

Here, as in *Dennis*, defendant has a particularized need to obtain the witnesses grand jury testimony to avoid any injustice. As in *Dennis*, Defendant's guilt or innocence may turn on uncorroborated witness testimony. It is of particular importance that counsel tests the veracity and accuracy of the testimony. This trial may not be set for years after the alleged charged events took place. The grand jury proceeding occurred closer in time to the charged events, and it is more than likely that the witnesses' memories of the charged event were better during that time. Because it is critical that defendant's attorney adequately investigate and render effective assistance of counsel to protect his constitutional rights, the court should guard against an unfair surprise and possible delay.

**b. DEFENDANT'S NEED FOR DISCLOSURE IS GREATER THAN THE NEED FOR SECRECY**

When the considerations justifying secrecy become less relevant, there is a lesser burden on the party seeking disclosure. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 223 (1979). Defendant's need for the disclosure of the grand jury transcripts outweighs the standing secrecy policy.

The Supreme Court, in *United States v. Procter & Gamble Co.*, list five general reasons

for grand jury secrecy.

(1) To prevent the escape of those who indictment may be contemplated; (2) to ensure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tamper with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosure by persons who have information with respect to the commission of crimes; and (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation and from the expense of standing trial where there was no probability of guilt. *Proctor & Gamble*, 356 U.S. 677, 685 (1958).

There are no viable secrecy concerns in the instant case. Nothing, in this case, suggests that the grand jury proceedings included testimony by reluctant witnesses compelled to testify. There has been no concern of witness intimidation or harassment. All witnesses to this point have cooperated with the government and have not been discouraged from cooperating. Additionally, the grand jury has completed deliberations; eliminating the risk that disclosure will interfere with those deliberations or dissuade witnesses from providing testimony. Therefore, the interest in secrecy has reduced as the grand juries functions have ended. The balance in this case tips in favor of disclosing the transcript to the Defendant. Should the Court have concerns on the effect the disclosure will have on future grand juries or this particular grand jury, the court can segregate irrelevant or protected portions of the transcript, or disclose portions of the transcript with a protective order. *Dennis*, 384 U.S. 875.

Defendant's need for disclosure outweighs the minimal need for secrecy. Defendant has a compelling interest in obtaining the grand jury transcript prior to trial in order to prepare and present his defense.

### III. CONCLUSION

For the foregoing reasons, Defendant respectfully prays this Court order the disclosure of the grand jury transcript of all witness testimony prior to trial. In the alternative, counsel requests that such testimony is provided immediately following the direct examination, and prior to the cross-examination, of all witnesses who testify for the State of Texas. Additionally, Defendant alternatively requests that this Court conducts an in camera inspection of the grand jury testimony and witness statements.

Respectfully submitted,

By: /s/ Sean C. Villery-Samuel  
Sean C. Villery-Samuel

### CERTIFICATE OF SERVICE

This certificate is to certify that on May 1, 2018, a true and correct copy of the above and foregoing document was served on the Attorney General's Office of Texas and the Chambers County District Attorney's Office, by electronic filing service.